



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

February 2, 2021

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the Commonwealth of Massachusetts

FROM: Justina Fugh, Alternate Designated Agency Ethics Official
and Director, Ethics Office

TO: Melissa Hoffer
Acting General Counsel

As the Acting General Counsel of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the Commonwealth of Massachusetts. Within the last year, prior to being selected for this position, you served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General's Office.

On January 20, 2021, you were appointed to the position of EPA's Principal Deputy General Counsel. The Acting Administrator approved that appointment on January 28, 2021. Based upon your appointment as the first assistant to the EPA General Counsel, you automatically became the Acting EPA General Counsel as a matter of law under 5 U.S.C. § 3345(a)(1). An incoming Principal Deputy General Counsel, appointed to that position after the General Counsel vacancy arises, may automatically serve in an acting capacity. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

Under President Biden's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."¹ Therefore the Ethics Pledge does not apply to your Massachusetts employment. Federal ethics rules, however, do not contain a similar exclusion for state government, so those rules do apply to your prior employment with the Commonwealth of Massachusetts.

What remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." You have a "covered

¹ *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."

relationship” with the Commonwealth of Massachusetts under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the Attorney General’s Office terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the Commonwealth of Massachusetts is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee’s participation outweighs concern over the questioning of the “integrity of the agency’s programs and operations.” 5 C.F.R. § 2635.502(d). The factors that we take into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee’s role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee’s duties that would reduce or eliminate the likelihood that a reasonable person would question the employee’s impartiality.

As Acting General Counsel, you are the chief legal advisor to the Agency and part of the Agency’s political leadership. In your current role as Acting General Counsel, and in your role as Principal Deputy General Counsel if you revert back within a year, you are expected to communicate freely with states, and you will be asked to participate in discussions and meetings related to particular matters that affect the Commonwealth of Massachusetts. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as part of your official EPA duties in particular matters that involve the Commonwealth of Massachusetts with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with the Attorney General’s Office.

In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General’s Office. In this role, you oversaw the Bureau’s attorneys on matters including prosecuting civil and criminal enforcement of environmental laws, energy policy, ratepayer advocacy, defensive cases, and affirmative advocacy. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Attorney General’s Office. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – We have determined that you do not have any significant financial interest in the Commonwealth of Massachusetts, so you do not have any conflicting financial interest.

Nature and importance of the employee's role – As the Acting General Counsel, you are the chief legal advisor to the Agency. Among other things, OGC lawyers provide legal counsel to EPA policymakers, shape national legislation affecting the environment, and provide legal support for the issuance of permits, the approval of environmental programs, and the initiation and litigation of enforcement actions. As Acting General Counsel, or as Principal Deputy General Counsel if you should revert back within a year, you are expected to communicate freely with states, including Massachusetts.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Massachusetts Attorney General's Office that will rise to your level of attention, merit your participation, and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as part of your official duties as Acting General Counsel, or as Principal Deputy General Counsel if you should revert back to those duties within the year, in such matters will be of importance to the Acting Administrator and the confirmed Administrator and, therefore, is in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General's Office. If the Agency determines that it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

You are also cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same or substantially related to the same specific party matter that you previously participated in personally and substantially, unless your bar provides for and you first obtain informed consent and notify OGC/Ethics. On January 19, 2021, I issued you an impartiality determination allowing you to participate in discussions and meetings related to the policy decisions for those cases that may affect or involve the Commonwealth of Massachusetts and in which you may have participated personally and substantially. However, you were reminded not to participate in the merits of those cases nor to reveal any client confidences.

While I have issued you this determination to interact with the Commonwealth of Massachusetts with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves Massachusetts. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at fugh.justina@epa.gov or (202) 564-1786.

cc: Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices
Elise Packard, Deputy General Counsel for Operations Programs
Daniel H. Conrad, Acting Associate Deputy General Counsel